Supreme Court of the United States.

OCTOBER TERM, 1893.

ARTHUR ORIGET

vs.

ELIZ. A. HEDDEN, Admx.

No. 94.

PLAINTIFF'S BRIEF.

Statement.

Suit to recover an alleged excess of duty exacted by defendant's intestate, as Collector at New York, upon goods there imported by plaintiff and entered on the 8th, 9th, 17th and 23d days of February, 1886, all preliminary steps to support this suit having been duly taken. (Rec. 8, fol. 17.)

The invoiced and entered values of these four importations were raised by the appraisers to an amount exceeding ten per centum thereof; upon which increased values the collector liquidated and exacted duties and also the additional duty, in each instance, of 20% mentioned in R. S., section 2900.

The plaintiff called for no re-appraisement of the entries of Feb. 8 and 9, but protested against the assessment of duty upon any values above those declared in the invoices,

"claiming that said valuations are correct, and that said goods are liable to no more duty than would accrue upon said valuations, and that the additional

values were *not legally ascertained;* that the appraiser *made no legal or proper examination* of said goods; that he arbitrarily added to the values upon an arbitrary and assumed basis of the cost thereof; that, in so doing, he acted under instructions from special agents of the Treasury, and *not upon his own knowledge or judgment;*—and we specially protest against the additional duty of 20%, claiming (for the reasons aforesaid) that it did not accrue," etc. (Rec. 9.)

At the trial, the New York manager of Mr. Origet's business having testified that he saw E. A. Brown, the assistant appraiser of the division into which these goods came, with reference to their appraisal. He was then asked:

"Q. State whether or not you said anything to Mr. Brown (and, if so, what) as to the production of evidence as to the value of the goods?" (Rec. 9, 10.)

The U. S. attorney objected to the question; upon the ground that the importer's remedy for any defect or informality in the appraisement, was by calling for a re-appraisement. The court thereupon excluded the foregoing question, allowing the plaintiff's exception. *(Id.* 10.*)*

The same witness testified he had conversation with the collector as to a re-appraisal, or call for one, of these two entries; being asked to state it, a similar objection was made, sustained, the question excluded, and exception allowed. *(Ibid.)*

Upon the two later importations, of Feb. 17 and 23, re-appraisements were called for, and had. That of Feb. 17, per stmr. Oregon, consisted of four cases, and that of the 23d, per Cy. of Chicago, of three cases. All seven cases were, by the collector, ordered to the public store, and were there at the time of the re-appraisements. The same merchant, John Lowry, acted as merchant-appraiser upon each of these re-appraisals. Being called by plaintiff, he testified;—

"I did not examine one case. I merely looked over the goods.

By the COURT. Q. "You did not examine any case?"

Ans. "Not specially: not to appraise it." (Rec. 10 mid).

The same was true of both importations *(Ib.)*

Of the report of these re-appraisals, and of the computations upon which it was based, he testified;—"There was one made up at my office; but one; and which one that is I cannot state, because it was a very complicated affair." It was made by Hy. A. Bashley, now dead. The papers prepared by Mr. B. merely went to assist General Appraiser Brower and Mr. Lowry in writing the case up. The paper was not preserved. It was for guidance simply. The report of appraisal signed by the witness was based upon that computation and the witnesses' reports. Mr. Lowry directed Mr. Bashley to make out the average of the different appraisals of the witnesses, and that he *understood* to be the character of the paper he received from Mr. Bashley. Witness said Gen. Appr. Brower sat with him "in the re-appraisal; in the writing up of the re-appraisals." (Rec. 10, fols. 20, 21.)

The Court excluded this question, put by plaintiff to this witness, allowing an exception;—

Q. "What I ask you is—Mr. Brower being the general appraiser, and sitting with you on the re-appraisal—was there or not any agreement (and, if any, what) as to the application of the valuation of one case on each invoice to the entire importation?" (Rec. 10, 11.)

The witness testified that Mr. Brower's action with reference to the examination was that he "simply passed and looked at them, to see that they were *woolens—he was not competent to judge of their value*—to see that they corresponded with the invoices." (Rec. 11, top.)

Cross-examined by the U. S. Atty., Mr. Lowry reiterated that he *made no special examination* of these

goods;—"what he did was, to pass into the part of the building where the goods were opened and placed for examination, and look over the goods to see that they were the same *order* of goods that his firm was in the habit of importing." He stated that only one case of the goods was opened; "simply one case of the goods that we looked at—one case was opened." He examined the greater portion of that case, enough to satisfy him that *it* was the same *order* of goods. (Rec. 11.)

Through further interrogation, he repeated that he only made such an examination of the goods in the single case opened as satisfied him they were of the same *order* of goods that Woods, Lowry & Co. imported *(Ibid).*

March 12, 1886, Mr. S. G. Clarke, attorney and counsel for Mr. Origet, was present at the appraiser's stores, when the reappraisement of plaintiff's goods was about to take place, and in writing asked, "as counsel for the importer, to be present to examine the schedules of the different witnesses, to ask them questions, or to suggest questions to the appraisers to be asked, and to hear and know the testimony," etc. (Rec. 12, mid.) "If this request is denied, I further ask, in the name of Mr. Origet, that Mr. A. Origet and Mr. Ridgely, associated with him in business, be present when the witnesses are examined in the case of Origet, and that one of them be allowed to see the schedules of the witnesses." (Rec. 12.)

The appraisers denied this application, while expressing a desire to hear Mr. Origet, in regard to his reappraisements, and to have any suggestions he might have to make as to asking questions of witnesses. (Rec. 12 bottom.)

With reference to the examination of witnesses' schedules, and to the importer's application the following entry was made upon the minutes:—

MR. BROWER. "Mr. Clarke further asks that they may be permitted to examine the various affidavits made by the experts, importers, merchants, and others, and also to be present at the taking of any testimony herein, and to cross-examine all such witnesses as may be produced here on this re-appraisement, or to suggest questions to the general appraiser.

"The general appraiser and the merchant appraiser say they cannot permit the importers to be present during the taking of the testimony, or the examination of the affidavits; but they will be glad to receive suggestions from the importers in asking any questions of any and all who may be called."

MR. CLARKE. "I don't see how we can make any suggestions as to asking questions unless we hear what is said; and therefore I renew my request (in view of the remark made by the general appraiser) that the respective parties in the two cases may examine the affidavits and schedules, together with the questions put to the witnesses who have been or who may be examined, and hear, or have exhibited to them the testimony that may be given, so that they may be enabled to suggest questions."

MR. BROWER. "The same ruling as previously." (Rec. 13.)

The plaintiff protested against the defendant's assessment and exaction of duties upon the values ascertained by means of these reappraisements, upon these grounds, viz.;—

"1st. That said goods are liable to no greater amount of duty than that accruing upon the invoice, or entered, value thereof.

2nd. That the appraiser's return, dated on or about Feb. 27th, 1886, was made contrary to law and without legal or proper examination of the goods.

3rd. That I was entitled to a re-appraisement of said goods, according to law, by a general and merchant aspraiser, and made due demand therefor on or about March 2d, 1886.

4th. That, notwithstanding said demand for re-appraisement, no *legal* re-appraisement of said merchandise was ever held.

5th. That the so-called re-appraisement, in accordance with which you have undertaken to assess and liquidate the duties upon said merchandise, was illegally

conducted, and was not a valid re-appraisement, according to which duties might be assessed, in this ;—that the general appraiser, George V. Brower, did not act upon his knowledge or judgment of the goods, but permitted his judgment and return of value to be controlled and dictated by special agents of the Treasury ;—

That *he did not personally examine and appraise the merchandise* in question ;—

That the merchant-appraiser, John Lowry, *did not personally examine and appraise the merchandise* in question ;—

That, although requested, said general appraiser refused to permit me to be represented by counsel ;—

That said general appraiser refused to allow counsel to be present to examine the schedules of the different witnesses, to ask them questions, or to suggest questions to be asked them ;—

That said appraiser refused to allow counsel to hear or know the testimony which he might receive ;—

That said appraiser refused to allow me and Mr. Ridgeley, associated with me in business, to be present when the witnesses were examined, and also refused to allow either myself or Mr. Ridgeley to see the schedules of the witnesses ;—

That thereupon the following proceedings took place before the general and merchant appraiser "—[reciting them, as hereinbefore given from the minutes.] (Rec. 13–14.)

"That, in the said re-appraisement, while refusing to permit my counsel or myself to be present, said general appraiser permitted special agents of the Treasury and my business rivals to attend ; " . . . . .

"That, on arriving at the valuation returned by said general and merchant appraiser to you they took *the average of the valuations of all the witnesses* examined, without regard to their competency or *knowledge of the goods ;*—

That witnesses were permitted to return schedules of the value of all the goods *without an examination* thereof by them ;—

That such schedules were considered by the merchant and general appraiser ;— . . . . (Rec. 14, 15.)

Referring to the goods which became the subject of re-appraisement, Mr. Origet's manager was asked ;—

Q. "State whether or not those goods in the several cases were all of the same character, as to *value?*" (Rec. 15, bot.)

This question was excluded by the Court, upon defendant's objection to it as "*immaterial*," and the plaintiff took and was allowed an exception. *(Ibid.)*

The same witness testified to the presence of Mr. Hinds, a Treasury agent, at the re-appraisement. Witness was then asked ;—

"Did you hear any of the questions put to the witness?"

Which question was objected to and excluded as immaterial, and exception taken. *(Ibid.)*

The next question, to the same witness, whether Mr. Hinds did not himself put questions to the witness upon that examination, was likewise ruled to be immaterial, and exception allowed to its exclusion. (Rec. 16 top.)

The difference between the amount of duty payable upon the entered value of the goods and that actually exacted by and paid to the collector, was shown to be $4,992.06 inclusive of interest to Feb. 17, 1890, the last day of the trial. (Rec. 16.)

The foregoing is a statement of all the evidence given in this case, the defendant offering none. *(Ibid.)*

Thereupon, defendant moved for and obtained a direction of a verdict in his favor; an exception to this ruling and direction being allowed the plaintiff *(Ibid.* 7 bottom.)

Judgment was thereafterwards entered upon this directed verdict *(Id.* 8 top) and the present writ of error is sued out to reverse it. *(Id.* 1, 2.)

Assignment of Errors.

The plaintiff in error assigns for error;

I. The direction of a verdict for the defendant. (Rec. 16, fol. 29.)

II. The verdict so rendered by direction. *(Ibid.*, and 7 bottom.*)*

III. The judgment entered upon such directed verdict. (Rec. 8 top.)

IV. The plaintiff's protest, as to the entries of Feb. 8th and 9th, 1886, claimed duty to be only assessable upon their entered value;—in that the additional values assigned them were not legally ascertained; that the appraiser made no proper or legal examination or appraisement of these goods, but arbitrarily added to their values, under instructions from special agents of the Treasury, and not according to his own knowledge and judgment:—to sustain which protests and averments, Mr. Origet's manager was asked (after he had testified to seeing Mr. E. A. Brown, assistant appraiser, with reference to them)

"State whether or not you said anything to Mr. Brown (and, if so, what) as to the production of evidence as to the value of these goods?" (Rec. 9, 10.)

Which question was objected to by the U. S. attorney, upon the ground that the importer's remedy for any defect or informality in the appraisement was by calling for a re-appraisement; whereupon the court excluded the question, allowing plaintiff an exception: *(Ibid.)*

And the plaintiff now assigns the exclusion of said question, and the ruling of the Court as to its admissibility, as error.

V. The same witness having testified that he had

conversation with the Collector as to a re-appraisal, or a call for a re-appraisal of these goods, was asked what the conversation was; which inquiry was objected to by the defense as immaterial and excluded. The plaintiff excepted, and now assigns this exclusion as error.

VI. As to the importations of Feb. 23, 1886, which were the subject of re-appraisal, the plaintiff's protest and allegations were, that the goods were only dutiable at their invoice and entered value, because there had been no such examination or appraisement thereof as would justify an increase of valuations for assessment. It appeared that all the (seven) cases comprising these importations were, by the collector's order, sent to the public store for examination; that but one case of each of the (two) invoices was even opened; and that no examination of the contents of these two cases was ever made by Mr. Brower, general appraiser, and the merchant appraiser looked to see only if they were the *order* of goods his own firm imported; that the witnesses examined by the appraisers handed in estimates of value, not based upon any examination of all the cases and contents; that there was an average of these estimates or 'reports' ordered by the merchant appraiser to be made by his clerk; and what was assumed to be such a statement of average was, by the appraisers, accepted as the basis of their increase of values upon which the duties protested against were exacted.

In this position of the case, this question was then put to Mr. Lowry (the merchant appraiser) by the plaintiff, objected to by defendant, and excluded by the Court, an exception being allowed;—

"What I ask you is—Mr. Brower being the general appraiser, and sitting with you on the re-appraisal, was there or not any agreement (and, if any, what) as to the application of the valuation of one case on each invoice to the entire importation?" (Rec. 10, 11.)

The exclusion of this question, the plaintiff now assigns as error.

VII. In view of the facts appearing, as above set forth, Mr. Origet's manager was asked by plaintiff, with reference to these three cases imported Feb. 23, 1886, which became the subject of re-appraisement, this question ;—

"State whether or not those goods, in the several cases, were all of the same character as to *value?*" (Rec. 15, bottom.)

Upon defendant's objection, that this question was *immaterial*, it was excluded by the Court, an exception allowed *(Ib.)* and the plaintiff now assigns the exclusion of this question as error.

VIII. The protest alleged the appraisers' returns not to indicate official and personal judgment, but to conform to the instructions of special agents of the Treasury. To sustain this claim, after proving the presence of Mr. Hinds, a special treasury agent, at the re-appraisement, this question was asked, excluded exception taken, and its exclusion now assigned as error ;—

"Did you hear any of the questions put to the witness?" (Rec. 15 bottom.)

IX. The protest alleged that Mr. Origet was not permitted to be present at the examination of witnesses, but special agents of the treasury were present and participated therein.

To support this, a witness was aked if said Hinds did not himself, put questions to witnesses upon that examination ;—which inquiry was objected to as immaterial, excluded and exception allowed. (Rec. 16 top.)

This exclusion is now assigned by the plaintiff as error.

X. The plaintiff assigns for error the ruling of the Court that the question of the constitutionality of Rev. Stats., section 2900 was not open to the plaintiff. (Rec. 16.)

Statutes.

Rev. Stats., Sec. 2899, requires all merchandise dutiable *ad valorem* to be appraised.

Sec. 2900 requires production of the invoice; to which the importer may make such addition, upon entry, as will in his opinion raise the stated valuation to the requisite foreign market-value; which value the collector may cause to be appraised;—

"and if such appraised value shall exceed by ten per centum or more the value so declared in the entry, then, *in addition* to the duties imposed by law on the same, there shall be collected a duty of twenty per centum ad valorem on such appraised value."

Sec. 2901. The colector *shall* designate on the invoice *at least* one package of every invoice, and one package at least of every ten packages of merchandise, *and a greater number should he*, or either of the appraisers, *deem it neccessary*, imported into such port, to be *opened*, *examined* and *appraised*, and shall order the package so designated to the public store for examination. . . .

Sec. 2902 makes it the *duty* of appraisers, by *all* REASONABLE *ways* and means in their power to ascertain, estimate and appraise the true and actual market-value of the importations.

Sec. 2939 prohibits the New-York collector from directing "to be sent *for examination*" any less than the prescribed tithe "under any circumstances"; and a greater number must be sent if he deem it necessary to so direct.

Secs. 2614–5 prescribe to appraising officers an oath to faithfully examine *according to law* the goods sent to them by the collector for examination and appraisement.

POINTS.

Preliminary.

A verdict having been given against us by direction, the judgment thereon must be set aside if, as to any item of our claim, there was any evidence to prove, and which would authorize a jury to find, the existence of a fact so material as (if found) to invalidate the whole procedure, as to either importation, whereby an increased valuation was affixed to our goods, entailing the consequent penalty.

There were two importations in the early part of February, 1886, and two others later in that month.

Certain of the questions to be discussed affect all four importations; while there are others which concern only one or the other brace of importations.

That of the legality or illegality, sufficiency or insufficiency, of the examinations made is raised by both protests; though the detail of just what was done and omitted is more fully set forth in the testimony as to importations of February 17th and 23d, which were the subject of reappraisement.

This vital question will, therefore, be first considered.

I.

Illegality and insufficiency of the examination upon re-appraisement.

It is proposed, first, to show that the value stated in the invoice can be departed from in the assessment of duty, and a higher valuation be adopted as the basis of such assessment, *only* by means of a *legal* appraisal, founded upon *such* an examination of the subject of appraisement as the statutes provide for and require.

In the importation of dutiable merchandise, as in most commercial dealings in which the question of value arises, the invoice is primarily the document of fundamental consequence and chiefly relied upon to ascertain it.

U. S. v. 67 Pack's. 17 How. *92.

It is the *prima facie* evidence of value in insurance and other commercial suits.

Graham v. Pa. I. Co. 2 Wash. 124.
Field v. Moulson, *Id.* 155.
LeRoy v. Un. I. Co. 7 Johns. 354.
Sturm v. Wms. 6 J. & S. 342.
Plank v. Gavila, 3 C. B. (N. S.) 806.

In all these cases, as in the administration of the customs laws, its statement of value is liable to be controlled, in a lawful manner and by proper evidence —but not otherwise.

Especially is this true with respect to the ascertainment of an *ad valorem* duty upon imported merchandise.

This is as much the case now as when Judge HOPKINSON referred to the fact when construing the act of May 28, 1830:—

Every direction given to the Collector supposes and requires him to have the invoice before him. He cannot take a step in performance of the duties imposed upon him, he cannot comply with one of the requisitions of the act, without it.

U. S. v. 28 Pckgs., Gilpin, 323.
See R. S., Secs. 2837 to 2839; 2852 to 2860; 2852 to 2865; 2899 to 2902; 2921; 2926; 2939.

These and many other sections and provisions of law indicate that it is substantially as true now as when Daniel Webster took note of it, in his tariff speech of May 9, 1828, that

Ad valorem duties, from the commencement of the government, have been estimated by reference to the

invoice, as fixing the value at the place whence imported. When not suspected to be false or fraudulent the *invoice* is the regular proof of value.

3 Webster's Works, 233,

italicized as here.

Tappan v. U. S., 2 Mason, 402, top.

This invoice value *must* be the basis of duty, unless some other valuation is arrived at *in the manner prescribed by law.* A value determined any otherwise than by the statutory method will not "displace that declared upon the entry." (20 How., 576.)

The Courts have always held, that the appraiser must follow the Statute in respect to ascertaining these values, or his action be illegal.

Manhattan v. Maxwell, 2 Blatch., 408.
Morlot v. Lawrence, 3 Id., 123.
Vaccari v. Maxwell, *Ib.* 377, close of Op.
Wilson v. Maxwell, 2 *Id.*, 319.
Gray v. Lawrence, 3 Id., 117.
Reiss v. Redfield, 4 Id., 382.
Arthur v. Goddard, 96 U. S., 145.
Oelberman v. Merritt, 123 *Id.*, 356.
Badger v. Cusimano, 130 *Id.*, 39.
Oberteuffer v. Robertson, 116 *Id.*, 499.
Robertson v. Frank, 132 *Id.*, 17.

That "if the appraisal was unauthorized," the invoice (as corrected upon entry) "should have been the only guide," see WOODBURY, J., in

Rankin v. Hoyt, 4 Howd., 332.
Greeley v. Thompson, 10 *Id.*, 239.

The legal method for determining whether the invoice or entered value, or some larger amount, is to be the basis upon which the appropriate rate of duty is to be computed, is established by Chapter Six of Title XXXIV. of the Revised Statutes, Sections 2899 to 2953, entitled "Appraisal."

Howland v. Maxwell, 3 Blatch., 146.
Carnes v. Same, *Id.*, 421.
Manhattan v. Same, 4 *Id.*, 408–9.

That method, then, is by strict compliance with these statutory directions as to appraisal.

The cases hereinbefore cited (and very many more might be cited of similar purport) show that if this prescribed method is not strictly followed, the appraisal is a nullity.

Ystalifera v. Redfield, 23 F. R. 650.

A result legally correct can only be reached through the proper application of correct legal principles.

Only those principles are legally correct, and to be observed, in this matter, which Congress has prescribed as the rule of action.

Inter alia, it has required the goods sent to the public store to be "examined" by the appraisers. If they fail to make *such an examination as the law requires* their action is a nullity, if properly protested against, etc.

Greeley v. Burgess, 18 How., 415-6.
Oelbermann v. Merritt, 123 U. S. 356.

Our protest sufficiently set up the failure to examine the packages sent to the public store (Rec. 14 top) more specifically than in 18 How. 415-416; and it was abundantly proved by the testimony (Rec. 10, 11) as will be more fully noticed presently.

These cases seem to us decisive, in our favor, of the one at bar.

R. S., Sec. 2901, requires the Collector to designate *at least* one package in ten to be sent to the public stores "*for examination.*" If he deems necessary, he may send a greater number there, to be "*opened, examined* and [then] appraised." Should he find (as he did in our case) this necessity to exist, the 'greater number' so designated must be 'OPENED, EXAMINED and appraised" precisely as the tithe would be, if that only was designated; the 'greater' or the 'least' number are to be subjected to the same scrutiny.

R. S. Sec. 2939 expressly repeats and enforces this

method of examination upon the customs-officers in New-York.

They are sworn *so* to examine. R. S., Secs. 2614–5.

If they fail to perform their oath and duty, their appraisal has *no* effect.

Oelbermann v. Merritt, 123 U. S. 356.

This was thus stated by the Circuit Court in New York, ten years ago ;—

"If a faithful examination was not had of the number of packages which the statute required to be examined [whatever that number might be] or of samples drawn from *such* number of packages, *there was no power in the re-appraisers to make an appraisal.*"

Ystalifera v. Redfield, 21 Blatc. 313.
Also, 110 U. S. 177.

Appraisals have been held illegal, and the invoice and entered value declared the proper basis of assessment, where the appraisers erred.

(1.) As to *time.* Griswold v. Lawrence, 1 Blatch. 499.

(2.) As to *place.* Thompson v. Maxwell, 2 *Id.* 385.

(3.) As to *qantity.* Schuchardt v. Lawrence, 3 *Id.* 397.

(4.) As to *currency.* Lowenstein v. Maxwell, 2 *Id.* 404, and Alsop v. Same, 3 *Id.* 399.

(5.) As to *mode and character of the examination,* etc. Burgess v. Converse, 2 Curt. 216.

Greeley v. Burgess, 18 How. 413.
Oelbermann v. Merritt, 123 U. S. 356.

(6.) As to the construction of the invoice. Arthur v. Goddard, 96 *Id.* 147.

(7.) Or in adopting any incorrect principle of law.
Robertson v. Frank, 132 *Id.* 17.
Badger v. Cusimano, 130 *Id.* 39.
Oberteuffer v. Robertson, 116 *Id.* 499.

The testimony in the case was *undisputed*, none having been adduced by the defendants (Rec. 16.)

It being proven that *all* the seven packages of which the re-appraised merchandise consisted were by the collector sent to the public store (Rec. 10, fol. 20) Mr. Lowry, the merchant-appraiser, testified, "*I did not examine one case.* I merely looked over the goods." *(Ibid.)* Replying, then, to the Court's inquiry, 'You did not examine any case?' the witness said; "Not specially; *not to appraise* it." *(Ibid.)* Upon cross-examination, he declared that *only one case* (of each importation) *was opened;* the greater portion of which case he examined,—enough to satisfy him they were the same *order* of goods his own firm imported. (Rec. 11.)

Yet the Court directed a verdict against plaintiff, without submitting the sufficiency of the examination to the jury; but ruling it to be a sufficient and legal examination. (Rec. 16, fol. 29.)

If but one case was opened, but one could have been examined by Mr. Brower, the appraiser; but that one could have been examined by the witnesses, whose variant estimates were averaged by Mr. Bashley *(a person having no official or sworn connection with the appraisement)* as the basis of the appraisal upon which enhanced duty was assessed, and heavy penalty (nearly $5000) exacted! (Rec. 10, fol. 20; 16, fol. 28.)

II.

Exclusion of evidence, offered to show the nature and illegality of the re-appraisements.

I. Having proved but one case of those sent to the public store for examination was ever even opened, the witness was asked whether or not he (the merchant appraiser) and the general appraiser did not agree to apply the valuation of this one case to the entire importation of which it was part, the whole having been sent to them "to be opened, examined and appraised." (Rec. 10, 11.) The question was *excluded.* (*Ib.*)

Certainly, this evidence tended to show an *intentional* disregard of law and duty, and to nullify the appraisement.

This Court ruled the importer could show the character of the examination, as non-compliant with the statute ; (123 U. S. 368) that the appraiser proceeded *upon a wrong principle, contrary to law.* (132 U. S. 24.) This we proposed, and were not permitted, to do.

Oebelmann v. Merritt, 123 U. S. 356.
Robertson v. Frank, 132 *Id.* 17.

II. To show how *very* material an injury the illegal course adopted inflicted upon us, we asked the importer's manager whether or not the goods in the unopened cases were of the same character, as to *value*, as those in the opened case ; as the plaintiff in the Burgess case showed that the samples dried by exposure did not fairly represent the dutiable quality of his sugar. (18 How. 413.)

The question was excluded as " immaterial." (Rec. 15 bottom.)

If answered negatively, it would show that our objections to the examination and re-appraisement were not technical, but very substantial. That such reply

would have been made is morally certain. At all events, the inquiry was pertinent.

III. Because of its connection with this subject of values, we will refer to the method of arriving at the appraisement; although the testimony to which we now refer was admitted without objection.

Henry Bashley, a clerk of Mr. Lowrey, with no right to intrude himself, or be brought, into this appraisal, made up an 'average' statement from the different values assigned by the witnesses to the contents of this one case which they saw; and the report to the collector of the appraiser's valuation of our imports was based upon this computation. (Rec. 10, fol. 20.) This was illegal; but we also desire to suggest, that if there was variance between the witnesses as to the value of the goods they did see, was it not utterly unjustifiable to apply that average to those goods which nobody saw, in the whole course of this so-called appraisement for duty.

The excluded question was not asked with any view to elicit a statement of value, but that there was a *difference* which the statutory examination would have disclosed; for lack of which, the goods were assumed to be as of *uniform* character as to value.

III.

Exclusion of Plaintiff from Re-appraisement.

The importer asked to be allowed to hear or meet the testimony as to the true value of his goods, and this privilege was denied him.

Inasmuch as we deem the re-appraisement clearly illegal and void, for non-compliance with the statute as

to the method of examination, we do not propose to dwell at length upon this alleged error of exclusion of the party; nor to more than hint, hereafter, at any question of constitutionality; but we do deem it proper to suggest that---whether Congress could constitutionally have done otherwise or not—it did intend, by the language adopted, to give us the right we were not permitted to exercise.

Assuming no such right existed as to the original appraisement, it was conferred (we say) in conferring the right of appeal and review.

We are aware of those decisions in which a different idea is intimated, and propose to offer a few observations thereon.

The leading decision, having this aspect, is Auffmordt vs. Hedden, 137 U. S. 310.

By reference to the transcript (No. 78, Oct. T. 1890) and to the report of the cause below, (30 Fed. Rep. 360) it will be found "that the plaintiffs did not request the board to examine any witnesses on their behalf, *nor to have counsel present*" *(Ib.* 361*)* but relied, in their protest, upon the illegality of those Treasury regulations under which they *assumed* such request would have been denied. (Ibid. and 137 U. S. 323.)

In the opinion delivered in this Court, it is observed that the question of dutiable value is not an issue to be judicially tried upon a re-appraisal, followed by the statement that

"No government could *collect its revenues*, or perform its necessary functions, if the system contended for by the plaintiffs were to prevail." (137 U. S. 323.)

We trust it may be permitted us respectfully to challenge the accuracy of this statement, and of its necessary inference, that "no government" does allow any such thing—so far as *appeals as to valuation for assessment* are concerned.

The supposition that revenues could not be collected

is shown erroneous by the fact that the estimated duties or taxes are paid or secured *before any re-appraisement* is had (R. S. sec. 2869) and it is only the alleged *excess* that is the subject of controversy. (Rec. p. 5, 'Bill of particulars,' 5th, 6th and 7th columns.)

That 'no government' could perform its functions, if the right to judicially review assessments was permitted, is met by the *fact* that the legislation of nearly, if not quite, every state in the Union *does* permit such review, as to taxes paid under protest. Judge NOTT, in an opinion which we have not this moment at hand, states that such is the law of every country in Europe calling itself civilized. We will try to call his resumé of the legislation of England, France, Germany, Spain, etc., to the attention of the Court at the oral argument.

It is with the tax-laws of New England and New-York that we are most familiar. In the former, at least, citizens are notified to bring in sworn lists of their property for taxation. This is exactly like an importer's invoice. If the assessors reject this list, the taxpayer can pay under protest and have a *judicial* hearing of the correctness of their action before the prescribed tribunal.

Such is, no doubt, the law in every state.

The course prescribed by the customs laws is closely analogous to, if not identical with, that pursued with reference to State taxation. The verified invoice corresponds to the bringing in and verification of lists by a tax-payer; as to which an appeal lies to a higher tribunal, where the protestant can be heard, if his list so presented is disregarded.

Hence, State decisions and text-books can be properly cited as to the true construction of the sections under consideration; the tenor of which citations will be found in conformity with the utterances of this Court.

We shall find it strongly laid down by text-writers and in the State and Federal Courts, that these laws

contemplate a regular hearing upon such an appeal; and numerous decisions that a statute undertaking to deny *such* a hearing would be unconstitutional.

As just noted, even if not a violation of the Federal Constitution, to deny the tax-payers a judicial hearing, this course of State and Federal Legislation and construction is a persuasive argument in favor of construing these sections of the customs laws as requiring a hearing of the importer upon his appeal.

In 115 U. S., at page 334, this language of BYLES, J., is quoted :—

" that *although there are no positive words in the statute requiring that a party shall be heard, yet the justice of the common law will supply the omission of the legislature.*" (115 U. S., 334.)

Cooper v. Wandsworth, 14 C. B. N. S. 194.

COOLEY, C. J.,

" It seems proper to declare in this case that parties whose property is to be taken under summary tax-proceedings are entitled, as of right, to be heard at some stage in the proceedings before the tax shall become an established charge against them or their property."

Thomas v. Gain, 35 Mich., 164, citing
Butler v. Superv., 26 *Id.*, 22, and
Phila. v. Miller, 49 Pa., St. 448 ;—

also a number of English cases holding the assessing officer personally liable; then the Opinion proceeds:

" In this country we do not allow *the justice* of the assessment to be inquired into in a suit to charge *the officers* with a *personal* liability; but it follows legitimately from this that parties taxed *must* have an opportunity to be heard regularly at *some* stage of the proceedings. Their rights are not to be concluded by proceedings which are wholly *ex parte*." (35 Mich. 165.)

Dool v. Cassopolis, 42 *Id.*, 548.

"In the words of a great judge, 'Goods, as goods,

cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are.'"

Boyd v. U. S. 116 U. S. 637 bot.

AGNEW, J.: "Land [imports] is taxed not as inanimate matter, which is insensate, and cannot respond to a duty, but as *property* to whose owner the law allows both time and place to respond", etc.

Phila. v. Miller, 49 Pa. St. 448.

"The commissioners of appeal act judicially. They try, determine and adjudge. . . . The proceeding, therefore, on appeal, before the commissioners of appeal, is in the nature of a suit wherein the party appealing is plaintiff and the assessor is defendant."

Nixon v. Ruple, 30 N. J. L. 60.

"However full and complete might be the jurisdiction of the board over the subject-matter, yet the party interested has, *according to the plainest principles of justice*, a clear right to a hearing and a day in Court; and any other view stands opposed to reason, justice, and sound policy, and to all those general principles which, in *all* cases, allow a party to be heard before his right of property can be affected by *any* tribunal.

Sioux v. Washington, 3 Neb. 43.
So. Platte v. Buffalo, 7 *Id.* 258.
Stuart v. Palmer, 74 N. Y. 191–5.

Where a tax-payer hands in his list and the assessors accept it, without objection, the tax cannot be increased without notice and hearing.

Moors v. St. Com. 134 Mass. 431.
McConbey v. Smith, 73 Ills. 314.
Cleghorn v. Postlethwaite, 43 *Id.* 428.

In his work on Taxation, Judge COOLEY notices that, in supplying revenue, there is a concurrent purpose to protect the citizen; and adds that all laws must be construed with this intent in mind. Cooley on Tax. (2d ed.) 265.

In a subsequent part of this work the author devotes several pages (pp. 361 to 366) to the question of the right of the tax-payer or assessed person to a hearing,

referring to the laws and decisions of the States upon this subject, viz. the bringing in of "lists" by the citizen, their effect, the opportunity for appeal, etc., etc.; referring to the probability of the original assessment being unjust, as based upon imperfect if not biased information, &c.

"It is therefore a matter of the utmost importance to the person assessed that he should have some *opportunity to be heard* and to present his version of the facts before any demand is conclusively established against him; and it is only common justice that the law should make reasonable provision to secure him as far as may be practicable against the oppression of unequal taxation, by making *the privilege of being heard* a legal right. *The obligation to secure such a right is recognized by the statutes of the several states*", etc. . . . "In other states an appeal is allowed to some board of review; and perhaps there is no state which does not provide some method whereby it is intended that the party assessed shall have a hearing before the assessment becomes fixed and *final*". *(Ib.* 361–2.*)*

He observes that when these statutory methods are followed, justice is likely to be preserved: "It is unfortunately often the case, however, that statutory provisions are not strictly observed, and that either the public or individuals will suffer in consequence". *(Ib)*

He adds, that, in such instances,

"In substance, the question will be whether the right to be heard is *a constitutional right* and indefeasible.

Upon this subject, *there is a general concurrence of authorities in the affirmative.*" *(Ib.* 362–3.*)*

We might indefinitely multiply citations to show that the very course which may be that referred to as one which *no* government would permit is almost universally allowed, and is demandable as a constitutional right; and every doubtful law is to be construed as conferring,

or not infringing, it; but we have already extended this topic further than we designed doing.

As to every valuation for customs revenue purposes, the right has always been recognized and many times explicitly declared to challenge the appraisement for fraud, or illegality, or want of power in the appraising tribunal to appraise *just as they did.*

See the numerous citations, *ante* pp. 14 and 15.

In the present instance, there was power in the officers to affix whatever value a *legal and proper* examination and procedure led them to consider just, whether more or less than that they established; but they *certainly* had *no* power to fix an arbitrary value, without the statutory examination; and we are inclined to believe they had no rightful power to go on with the proceeding, after excluding plaintiff from any real participation therein.

Possibly, the Court below was misled by the *syllabus* in Hilton v. Merritt, 110 U. S. 97; which states that the valuation is conclusive "in the absence of *fraud*"—making no further limitation as to the action of the appraisers. The opinion, however, states the law conformably to all the earlier decisions by ascribing finality to a decision only "as long as the officers acted without fraud AND *within the power conferred on them by the statute.*" (*Id.* 106, bottom.)

Auffmordt v. Hedden, 137 U. S. 324, bottom.
Robertson v. Frank, 132 *Id.* 17.
122 U. S. 356 and 369.
And cases *ante* pp. 14 and 15.
Passavant v. U. S. 148 *Id.* 214.

In this last cited case the opinion, at top of page 220, inadvertently follows the insufficient syllabus of Hilton v. Merritt, 110 U. S. 97; stating *fraud* as the ground of impeachment, without also mentioning *illegality* as having the same effect. In the other case

there (148 U. S. 220) cited, the statement is, correctly, that a "*properly conducted*" re-appraisement is final.

Earnshaw v. U. S. 146 U. S. 60, 66.

IV.

Penalty.

It will be noted that, in this case, the collector imposed and collected a *penalty* from the plaintiff. (Rec. 8 bottom.) In this particular, this case differs from Auffmordt v. Hedden, 30 Fed. Rep. 361 top; 137 U. S. 311 bottom.

It by no means follows that—even if government officers, upon appeal, can affix an arbitrary valuation, for revenue purposes, without hearing the owner—they can affect a man with a severe pecuniary penalty without giving him an opportunity to be heard "by himself and counsel."

True, it is called "additional duties," but it is in fact a penalty; and would be if called a 'donation,' or 'voluntary contribution.'

U. S. v. Choteau, 102 U. S. 611.

Regarding substance rather than veneering phraseology, this Court will not allow a citizen to be deprived of his property without hearing and without redress, by a mere euphemism.

Ry. v. Winans, 17 How. 40.

This would sacrifice a great principle to form (102 U. S. 611.)

This provision, *adding* 20% to the duty imposed by law for revenue purposes upon the importation of such goods, is intended to prevent undervaluations, treated also in many other statutes as a crime;

the means of prevention being the *punishment* of its occurrence. (102 U. S. 611.)

Straithairly, 124 U. S. 571.

"As between the U. S. and the importer . . . it must be regarded in the light of a *penal* duty."

Bartlett v. Kane, 16 How. *274.
Stairs v. Pearlee, 18 *Id.* 527-9.

Chief-Justice TANEY noticed that this "*penal* exaction" of 20% was inflicted "by way of *punishment* for the attempt upon the revenue laws of the country," adding;—

"Here are two *distinct* things; One is an ascertainment of actual value, the other the *penal* consequence flowing from this ascertainment of real value; the first fixes the actual value," etc. . . . "But *the second is quite another affair*," etc. (Tan. 186)

Hence, although the act of 1799 (R. S. sec. 3015) allowed a drawback of duties upon all importations exported; and the act of 1800 (R. S. § 3027) excludes therefrom only *such* "additional duties" as are levied upon goods brought in foreign bottoms; the Chief-Justice concluded there could be no refund of this 20% upon exportation, because it was a punishment inflicted upon the importer by levy upon "the articles in regard to which he had *offended*."

Bartlett v. Kane, Taney, 186.
Affirmed, 16 How. 263-274.

Upon this last page, it is said the drawback law "does not include in its purview any return of the forfeitures or amercements resulting from illegal or fraudulent dealings," etc. (16 How. 274.)

It is exacted, then, *as a punishment for fraud and violation of law; i. e.*, as the *penalty* therefor.

Md. v. B. & O., 3 How. 552.
U. S. v. 67 Pckgs. 17 *Id.* 94.
U. S. v. Sugar, 1 Abb. U. S. 421.
San Luis v. Hendricks, 71 Cal. 245.

Protector v. Grice, 5 Q. B. Div. 596.
Moore v. Ills. 14 How. 19, 20.
Coleman v. Tenn. 97 U. S. 537.

Burrill and Bouvier define 'penalty' as a "*pecuniary* punishment or sum of money imposed by statute to be paid as a punishment for the commission of a certain offense."

Bank v. Bliss, 13 Ab. Pr. 236.

As this statute inflicts a penalty for the crime of a stated amount of undervaluation; deprives the offender of a specified portion of the affected property as punishment of an offense the commission of which, in the present instance (and usually), the accused party denies;—there must either be an opportunity afforded for judicial determination of the issue made by this accusation and denial, or else the law denouncing the penalty is unconstitutional, as contravening the "Fifth" amendment of the Constitution, which forbids that any man "be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

There is no other alternative.

In several cases (Oelbermann v. Merritt; the Frank case; and others) it has been strenuously contended by counsel, that Sect. 2930 of the Revision is unconstitutional; but the Courts decided in favor of the parties making this contention upon other grounds, and waived consideration of this subject.

The Auffmordt case (137 U. S. 324–5 and cases there cited) simply held that the appraisers could be made final judges of *value*, PROVIDED their action was not fraudulent and conformed to law. It has *never* been held that a penalty could be irrevocably inflicted by administrative officers.

Conceding that the government 'has the right to prescribe the conditions on which it will subject itself

to the judgment of the courts *in the collection of its revenues*,' the legislative department cannot confide to administrative officers the *infliction of penalties* without the interposition, or final sanction, of judicial authority.

Congress cannot constitutionally prescribe, in an act imposing conditions of importation, that goods which the collector or appraiser deems to have been smuggled shall by the mere fiat of that officer, be confiscated upon that ground;—nor can it say that any percentage of them (or of their value) shall be forfeited for non-compliance with customs laws, upon an executive officer's say-so.

Dunn v. Burleigh, 62 Me. 37.
King v. Hayes, 80 *Id.* 206–7.
Lowry v. Rainwater, 70 Mo. 152.
Fisher v. McGirr, 1 Gray, 1.
Rockwell v. Nearing, 35 N. Y. 305–7.
McVeigh v. U. S. 11 Wall. 267.

It may not be a circumstance of any weight, but it is the fact that these administrative officers have always considered themselves as inflicting penalties, whenever they exacted this additional 20%, and have generally so designated it. It is a more important consideration that the courts have so spoken of them, frequently.

The Customs Regulations of 1890 contain this provision;—

"Art. 896. It is optional with the Government whether to sue for forfeiture, or to impose the additional duty; but it cannot do both. If proceedings *in personam* for recovery of home market value have been instituted, additional duties cannot be imposed for undervaluation."

This *must* be because a person is not to be twice *punished* for the same *offense*.

Decisions innumerable might be cited in which the U. S. Supreme and Circuit Courts have called this addition a "penalty." *Ex. gr.*, NELSON, J.; 4 Blatc. 224; and cases *passim*. So does the U. S. Attorney-General. (15 Atty. Gen. Op. 335, and 16 *Id.* 66.)

As noted, it was long uniformly recognized as such in numerous instructions and customs decisions of the Treasury Department.

21 Int. R. Rec. 91; S. S. Nos. 3335, 3370, 3483, 7226, 8089 and innumerable others.

V.

As to goods not re-appraised.

No re-appraisement was had of the entries of Feb. 8 and 9, the importer protesting against paying upon any greater values than stated in the invoices, upon the ground that the appraisal was illegal.

In Burgess v. Converse, Judge CURTIS held that, if the appraisal was illegal, and the importer by his protest, called the attention of the Collector under whose direction it was made to this illegality, and the collector ratified and adhered to the appraisement in assessing duty, an action to recover any excess of duty thereby illegally exacted could be maintained, *without* calling for a re-appraisement.

In delivering his opinion upon this point, CURTIS, J., observed:

It is argued, that the importer is obliged to take an appeal, if dissatisfied for any cause, and that he is entitled to two regular proceedings, and to the fair judgment of both sets of appraisers thereon. I consider him entitled to have both proceedings regular, but *I do not think he is bound to take an appeal, if the government appraisers have not proceeded in conformity with the authority conferred on them by law.* In my judgment, he may and *should*, in such a case, make his protest and point out the irregularity, or departure from the law, and stand upon it, as the ground of refusal to pay the increased duty, and in such a case, the Collector would not be justified in exacting the increased duty by an illegal appraisement. But if he

demands a reappraisement and that is regular, he waives all objection to the first, which is superseded and rendered unimportant by the second, on which the law, in terms, requires the Collector to proceed, as final and binding.

The objections to the proceedings of the government appraisers are, therefore, immaterial in this case. But I am of opinion, the proceedings of the merchant appraisers were not conformable to law, upon the facts offered to be proved by the plaintiffs.

Burgess v. Converse, 2 Curt., 220.
U. S. v. McDowell, 21 Fed. R. 564.
Obertuffer v. Robertson, 116 U. S. 499.
Robertson vs. Frank, 132 *Id.*, 17.

Evidence to show the illegality of these appraisements was excluded (Rec. 10 top) upon the ground that our *only* remedy was by calling for a re-appraisement. This we assign as error. *(Ante*, p. 9, Par. IV.*)*

VI.

Conclusion.

As to our two earlier importations, then, we say the invoice values should prevail, because the appraisals by which the government sought to displace them were illegal.

Upon the others a reappraisement was called for, but it was illegally conducted and ineffective.

If the appraisal be illegal, we base our claim upon that illegality in the exaction. If the basis of duty be the result of an unlawfully conducted re-appraisement, then we make that the ground of our claim; that the action of the government is illegal in this respect. And upon the theory indicated in these sentences, there is included in the present action items where there was no reappraisement, as well as others where there was one—or what purported to be one.

We also strenuously protest against the infliction of a grievious pecuniary penalty without opportunity to be judicially heard as to the alleged crime of which it is the punishment.

We feel confident the verdict directed in this case, and the judgment thereon, must be set aside, for want of the statutory examination of our goods; but we trust the Court will find occasion to declare that no *penalty* (under whatever name) can be imposed upon a party not permitted a judicial hearing.

EDWIN B. SMITH,
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New York,
Of Counsel for Plaintiff.

was tried before Judge Lacombe and a jury. A verdict was directed in favor of the collector, and the importer assigns error.

The importer's main claim is that he had the right, personally or by counsel, on the reappraisement of his goods by the general appraiser and merchant appraiser under section 2930 of the Revised Statutes, to cross-examine the witnesses and examine the schedules made out by them, etc.; and, as they refused him this right, he claims that both the valuation fixed by the reappraisers and the additional duty computed thereon by the collector under section 2900 of the Revised Statutes were illegal. He also claims that the reappraisers did not qualify themselves to act by a sufficient examination of the goods. Though in a slightly different form, the main objections were the same which have since the trial been unsuccessfully raised in this court in *Auffmordt* v. *Hedden* (137 U. S., 310) and *Passavant* v. *United States* (148 U. S., 214). In fact, the brief here filed for plaintiff in error is, in the main, a *verbatim* copy of portions of the brief filed on behalf of the plaintiff in error in the Passavant case.

ARGUMENT.

I.

The reappraisers were duly qualified to act as such.

There is no suggestion that the merchant appraiser was not a "discreet and experienced merchant, * * * familiar with the character and value of the goods in

question." (Rev. Stat., § 2930.) He was a member of the firm of Woods, Lowry & Co., engaged in importing similar goods.

The claim is that a sufficient examination of the goods was not made. The record does not show what examination was made by the general appraiser, Mr. Brower. Plaintiff, however, attempts to show that the merchant appraiser, Mr. Lowry, was disqualified for two reasons: first, that he did not examine carefully enough the cases of goods which he did examine; second, that he only examined one case out of each importation.

(1) Plaintiff's first contention is based on certain language used by Mr. Lowry when first taking the stand:

> I did not examine one case. I merely looked over the goods.
>
> Q. You did not examine any case?—A. Not specially; not to appraise it (p. 10).

On cross-examination he explained himself as follows:

> That in reply to plaintiff's question in direct examination he did say that he made no special examination of these goods. What he did do was to pass into the part of the building where the goods were opened and placed for examination and look over the goods to see that they were the same order of goods that his firm was in the habit of importing (p. 11).

He further testified that, having opened one case out of each importation:

> He examined the greater portion of that case enough to satisfy him that it was the same order of goods [that his firm was in the habit of importing]—

not a thorough examination, but enough to see that they were the same order of goods that Woods, Lowry & Co. had imported; enough to satisfy him of that fact.

Q. * * * I understand you now to testify that you examined the goods in one case sufficiently to satisfy yourself that they were of the same order of goods that your firm had imported?—A. Yes, sir. (p. 11.)

No standard higher than this has been laid down. The court and jury can not tell what examination of a case of woolen goods is sufficient to qualify a merchant for appraising them; nor can the jury pass on the degree of care which he has exercised. If he examines sufficiently to establish that the goods are the same as those which he was himself bringing into the country, he has an unusually high qualification as an expert.

The case of *Hilton* v. *Merritt* (110 U. S., 97) is in point. There plaintiff offered evidence "to show carelessness or irregularity in the discharge of their duties by the customs officers" (pp. 106–7). The evidence was excluded, and the court refused to submit the question: "Whether a fair examination of the goods was made by the general appraiser, associated with the merchant appraiser." (Approved in *Auffmordt* v. *Hedden*, 137 U. S., at p. 325.)

In *Greely* v. *Burgess* (18 How., 413) the importer's objection was sustained because the appraisers made no examination of the goods at all, but instead examined samples that somebody else had drawn out of the bales long before, it appearing in the testimony that the intervening time had increased the value of the samples thus

drawn. In *Oelbermann* v. *Merritt* (123 U. S., 356) the trial court excluded all testimony as to the extent of the examination made.

Some point is made of the fact that the reappraisers hired one Bashley to average the appraisements given by the different expert witnesses who appeared before them. It does not appear, however, that Bashley's average was adopted as the official valuation of the goods. "It was for a guidance simply. The report of the appraiser, signed by the witness, was based upon that computation and the witnesses' reports" (p. 10).

It is, therefore, unnecessary to discuss what would be the effect if it could competently appear, and did actually appear, that the appraisers agreed to report the average of the figures given by different experts without exercising their own independent judgment in the matter.

(2) It does not appear that there was any necessity of examining every case in each importation for the purpose of qualifying the reappraisers or enabling them to make a proper valuation. There were two importations before them, one of four cases and the other of three. It would satisfy the statute if one out of each were examined, unless the collector should direct more "to be sent for examination and appraisement." (Rev. Stat., §2939.)

Upon these importations the seven cases were all ordered to the public store by the collector. It does not appear that he directed them to be sent there "for examination and appraisement." It may be that they were sent for convenience merely.

Moreover, the invoices are not set forth in the record or in any way described. All presumptions are in support of the decision of the court below (*Phila., etc., R. R. Co.* v. *Stimpson*, 14 Pet., 448,459). Both upon this ground and from general probabilities it may be assumed that the invoices in each importation showed the goods in the different cases to be of the same character and value, so that the examination of one case would be sufficient for all. If this were not the fact it was for the plaintiff to establish the contrary by producing the invoices.

Plaintiff did indeed undertake to establish that "those goods in the several cases" were not "all of the same character as to value" (p. 15). This was excluded as immaterial. It was of course immaterial, for the question covered both the importations, while the reappraisers examined one case out of each importation. It was of no possible interest or importance whether the four cases imported by the *Oregon* were or were not similar to the three cases imported by the *City of Chicago*.

Plaintiff relies on the provision of section 2939 of the Revised Statutes, that—

> The collector of the port of New York shall not, under any circumstances, direct to be sent for examination and appraisement less than one package of every invoice, and one package at least out of every ten packages of merchandise, and a greater number should he, or the appraiser, or any assistant appraiser, deem it necessary.

To this suggestion it may be answered in the first place, as above stated, that there is nothing here to show that the collector sent the extra cases "for examination and appraisement," rather than simply for convenience.

But this provision for the examining of at least one case in ten, and of all cases sent by the collector, is for the benefit of the Government and not of the importer. This is shown from the fact that the Secretary of the Treasury can dispense with this requirement in his discretion, taking into consideration the interests of the Government alone. This appears from the second sentence of the section above quoted:

> When the Secretary of the Treasury, however, from the character and description of the merchandise, may be of the opinion that the examination of a less proportion of packages will amply protect the revenue, he may, by special regulation, direct a less number of packages to be examined.

This shows most conclusively that the provision which the importer attempts to call to his aid was not intended for his benefit. The cases upon which he relies were decided under a different statutory provision. (*Burgess* v. *Converse*, 2 Curt., 216, affirmed in 18 How., 413; *Ystalifera Iron Co.* v. *Redfield*, 23 Fed. Rep., 650.) In the former case Mr. Justice Curtis said (p. 221):

> It is insisted by the district attorney that this is merely directory to the collector for the protection of the revenue from fraud. No doubt this was one purpose, and I think the leading purpose of the section, but can I say it was its sole purpose?

Had section 2939 of the Revised Statutes been before him, instead of the act of 1846, there can be no doubt that he would have answered this question in the affirmative. This point is more fully discussed in the brief filed by the undersigned in the case of *Erhardt* v.

Schroeder, No. 211 on the docket of the October term, 1893, argued January 24, 25, 1894, and not yet decided by this court.

Moreover, if the importers desired more than one case to be opened and examined they should have made the point at the time. It was doubtless an afterthought. It is not even suggested in their very elaborate protest. It was an objection of a kind that must be distinctly and specifically set forth in the protest, and not being so set forth it is waived. (Cases cited in *Herrman* v. *Robertson*, 152 U. S., 521, 524–5; *Norcross* v. *Greely*, 1 Curt., 114; *Tucker* v. *Maxwell*, 2 Blatchf., 517; *Stalker* v. *Maxwell*, 3 Blatchf., 138; *Mason* v. *Kane*, Taney, 173; *Thomson* v. *Maxwell*, 2 Blatchf., 385; *Pierson* v. *Maxwell*, Id., 507; *Focke* v. *Lawrence*, Id., 508; *Warburg* v. *Maxwell*, 3 Blatchf., 382.) Plaintiff relies on *Greely* v. *Burgess*, 18 How., 413, 416, where a protest "that the goods were not fairly and faithfully examined by the appraisers" was sustained, three justices dissenting; but in that case there was no examination of the goods at all, so that the words "fairly and faithfully" were surplusage.

II.

The importer's counsel had no right to cross-examine witnesses or be present at all proceedings, as claimed.

Upon the proceedings before the reappraisers plaintiff's attorney made to them the following request:

> I ask, as counsel for the importer, to be present to examine the schedules of the different witnesses, to ask them questions, or to suggest questions to you to be asked them, and hear and know the testimony which you have received or may receive (p. 12).

This application was denied.

He then asked that plaintiff and his business associate—

> Be present when the witnesses are examined, * * * and that one of them be allowed to see the schedules of the witnesses * * * [to] examine the affidavits and schedules, together with the questions put to the witnesses who have been or who may be examined, and hear or have exhibited to them the testimony that may be given, so that they may be enabled to suggest questions (pp. 12, 13).

This application was denied, except that the reappraisers stated a desire to hear the importer as to his reappraisement, and to have any suggestions as to asking questions of witnesses, saying:

> They can not permit the importers to be present during the taking of the testimony or the examination of the affidavits, but they will be glad to receive suggestions from the importers in asking any questions of any and all who may be called (p. 13).

The object of the reappraisers was plainly to elicit fuller information from the witnesses than could be obtained without a pledge of secrecy.

The exclusion of the importer from the room while the witnesses were present and the secrecy observed as to their testimony were in pursuance of certain well-known Treasury regulations promulgated in 1884 and 1885:

> Merchants' appraisements should not assume the nature of a judicial inquiry, * * * but should be conducted as an investigation by experts; * * * application for copies of proceedings on reappraise-

ments should be made to the general appraiser, who will exercise his discretion in regard to furnishing the same. It shall be the duty of the appraisers, * * * by all reasonable ways and means in * * * their power, to ascertain, estimate, and appraise the true and actual market value and wholesale price, etc. (Regulations of 1884, arts. 474, 475.)

The law provides that the merchant appraiser shall be familiar with the character and value of the goods in question, and it is presumed that the general appraiser will have or will acquire such expert knowledge of the goods he is to appraise as to enable him to intelligently perform his officia duty with a due regard for the rights of all parties and independently of the testimony of interested witnesses. The functions of the reappraising board are the same as those of the original appraisers. They are themselves to appraise the goods, and not to depend for their information upon the appraisement of so-called experts in the line of goods in question. * * * Appraisers are authorized to summon witnesses, but there is no authority for the public examination of such witnesses or their cross-examination by importers or counsel employed by such importers. The appraising officers are entitled to all information obtainable concerning the foreign market value of goods under consideration, but such information is not public property. It is due to merchants and others called to give such information that their statements shall be taken in the presence of official persons only. It must often occur that persons in possession of facts which would be of value to the appraisers in determining market values are deterred from appearing or testifying by the publicity given to reappraisement proceedings. (Instructions of June 9, 1885.)

These regulations are set forth in full in the opinion of this court in *Auffmordt* v. *Hedden* (137 U. S., 310, 312–18), and were approved by the court, speaking through Mr. Justice Blatchford, in the following language:

> We are of opinion that, under the statute, the question of the dutiable value of the merchandise is not to be tried before the appraisers as if it were an issue in a suit in a judicial tribunal. Such is not the intention of the statute, and the practice has been to the contrary from the earliest history of the Government. No government could collect its revenues or perform its necessary functions if the system contended for by the plaintiffs were to prevail. *The regulations prescribed in the instructions from the Treasury Department are reasonable and proper.* * * * The proceedings for appraisal must necessarily be to some extent of a summary character (pp. 323–324).

The plaintiff here tries to distinguish the Auffmordt case, claiming that the remarks quoted are *obiter* so far as the present objections are concerned; that the validity of the Treasury regulations was not involved, because it did not appear that the proceedings were actually governed by these regulations.

The precise events before the reappraisers do not seem, indeed, to have clearly appeared in that case (pp. 322, 323). The importers there relied upon the presumption that the Treasury regulations above quoted were followed. This court assumed, for the purposes of the decision, that the presumption was correct.

> Inasmuch as the court directed a verdict for the defendant, the plaintiffs properly raise the question as to whether what was done by the appraisers, as shown by the evidence, shows that the reappraisers

> proceeded "by all reasonable ways and means" to ascertain the value of the goods. In other words, the instructions of the Treasury Department being in evidence, *and it being presumed that they were followed*, the question is raised *whether those instructions give the importer all the rights to which he is entitled* * * * (p. 321). The contention of the plaintiffs is that, under the instructions of the Treasury Department and the evidence, the question in issue as to the dutiable value of the merchandise could not be reasonably heard at all, on the reappraisement, because (1) the importer or his agent was practically excluded from the reappraisement, etc. (p. 323).

This contention the court disposed of, not simply by saying that the record was insufficient to raise the point, but by saying that the point was not a good one, using the language first above quoted from the opinion. The case now at bar was tried February 14, 1890. The Auffmordt case was decided December 8, 1890, affirming, however, a prior opinion at circuit to the same effect (30 Fed. Rep., 360), and following in principle prior authorities in this court which are cited in the opinion (137 U. S. at pp. 324, 325). In the able and successful brief of the importers' counsel in the *Oelbermann* case, so much relied upon by this plaintiff, it had been conceded that the reappraisers "may exclude from the appraisement proceedings all persons whomsoever."

Plaintiff relies upon the well-known cases holding that in proceedings for assessment or taxation, or under the right of eminent domain, the citizen is entitled to notice and a hearing before he can be made to part with any of

his property; supposing a "hearing" to involve the right of confronting all witnesses, etc. Among these cases he italicizes in his brief *Stuart* v. *Palmer* (74 N. Y., 183), which, indeed, may be said to be the leading case on this point, and whose constant use in brief and argument has caused the court which decided it to say of it: "All cases are more or less liable, in the stress of litigation, to be cited as authority for what they do not hold, and the one referred to has had its share of that treatment." (*Matter of Common Council of Amsterdam*, 126 N. Y., 158, 163.) The principle laid down in *Stuart* v. *Palmer*, so far as here applicable, is that the citizen is entitled to "some opportunity * * * to be heard" (p. 190); "an opportunity for making suggestions and explanations to the proper administrative board or office" (p. 192, quoting from 31 N. Y., 574); a hearing "in some form" (p. 193, quoting from 65 N. Y., 193); "an opportunity for a hearing of some description" (p. 194, quoting from Cooley on Taxation, p. 266). Nothing more is called for by the opinions of this court. All that has been required is "such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case." (*Davidson* v. *New Orleans*, 96 U. S., 97; *Spencer* v. *Merchant*, 125 U. S., 345; *Walston* v. *Nevin*, 128 U. S., 578, 582; *Lent* v. *Tillson*, 140 U. S., 316, 327; *Paulsen* v. *Portland*, 149 U. S., 30; *Pittsburgh Railway Co.* v. *Backus*, 154 U. S., 421, 426.) In *Palmer* v. *McMahon*, 133 U. S., 660, 669, Mr. Chief Justice Fuller said:

> The power to tax belongs exclusively to the legislative branch of the Government, and when the law provides for a mode of confirming or contesting the

charge imposed, with such notice to the person as is appropriate to the nature of the case, the assessment can not be said to deprive the owner of his property without due process of law. (*Spencer* v. *Merchant*, 125 U. S., 345; *Walston* v. *Nevin*, 128 U. S., 578.) The imposition of taxes is in its nature administrative and not judicial, but assessors exercise *quasi* judicial powers in arriving at the value, and opportunity to be heard should be and is given under all just systems of taxation according to value. It is enough, however, if the law provides for a board of revision authorized to hear complaints respecting the justice of the assessment, and prescribes the time during which and the place where such complaints may be made. (*Hagar* v. *Reclamation District*, 111 U. S., 701, 710.)

"The fact, however, must be kept in view that the notice and hearing which the Constitution demands need only be such as are adapted to the nature of the assessment proposed, and such as afford to each individual the opportunity to show that, according to the method prescribed by competent authority for making the assessment, the amount charged against him is incorrect." (*Garvin* v. *Daussman*, 114 Ind., 429, 433–4. See also *Patten* v. *Green*, 13 Cal., 325, 329.)

There is a conflict of authority as to the requirement of notice. The authorities are collected in 2 Dillon on Municipal Corporations, 4th ed., at pp. 982–5.

Plaintiff's argument, carried to its logical results, would upset the whole system of appraisement by experts in assessment, tax, or eminent domain proceedings. It is of the essence of such proceedings that the judges may use their own special knowledge and experience, and the

results of private investigation, as well as the testimony formally adduced before them. As was remarked by Judge Lacombe in directing the verdict in this case:

> Even commissioners who proceed to value land in condemnation proceedings, while they hear the parties, yet may advise themselves, as the courts have said on several occasions, by conversing with men in all places, as at railroad stations and in taverns, or wherever they may be; and may there form their own independent opinions as to the value of the land, irrespective of what may have been stated under oath by its owners.

In *Case of Spring Garden Street*, 4 Rawle, 192, the Pennsylvania supreme court said:

> As to the objection that the viewers conversed with the owners of property adjoining, in the absence of the parties interested, we see nothing wrong in that. An inquest of this sort is restrained to no peculiar species of evidence, and may resort to any source of information which the members of it may think proper—even the evidence of their senses.

Authorities to the same effect are numerous. (*Port Huron Railway Co.* v. *Voorheis*, 50 Mich., 506, 510; *Toledo Railway Co.* v. *Dunlap*, 47 Mich., 456, 466–7; *Kramer* v. *Cleveland Railway Co.*, 5 Ohio St., 140, 147; *Lyman* v. *Burlington*, 22 Vt., 131, 136; *Inhabitants of Readington* v. *Dilley*, 4 Zabr., 209, 216–7; *Columbia Bridge Co.* v. *Geisse*, 36 N. J. L., 537, 539.)

Because the commissioners in such proceedings act partly on evidence not in the record, their errors of judgment can not be reviewed on appeal. (*Shoemaker* v. *United States*, 147 U. S., 282, 306.)

Assessments for taxation are proceedings ordinarily much more summary in character than those under the right of eminent domain. The assessors deal with vast numbers of different individuals, whose affairs come before them at different times, but who should receive equal treatment in matters of valuation. The assessors, therefore, act, and ought to act, in each case mainly on information received by them in other cases; in each case, in fact, upon the resultant of all the information received up to date. Yet it is not claimed that the individual taxpayer is deprived of due process of law, so long as he is duly notified and allowed to say his own say in his own behalf.

Appraisements for customs duties are to this extent similar in character and principle. In fact, the whole theory of the present Board of General Appraisers is based on the advantage of having appraisements made by experts; in other words, by persons who apply to the case in hand a vast amount of special information obtained in other cases or in other avocations.

But custom-house proceedings are further distinguished from taxation and eminent domain proceedings alike in this respect: That no property of the citizen is being taken from him at all. He asks the privilege of bringing goods into the country, and a condition is imposed upon that privilege, as shown in the extract from the Auffmordt opinion in our next point.

III.

There being no jurisdictional defect in the reappraisers' proceedings, their valuation is final.

This is unquestionably settled by *Auffmordt* v. *Hedden* (137 U. S., at p. 329), the court saying:

> Nor is there anything in the objection that section 2930 of the Revised Statutes is unconstitutional in making the decision of the appraisers final, and that the plaintiffs had a right to have the question of the dutiable value of the goods passed upon by a jury. As said before, the Government has the right to prescribe the conditions attending the importation of goods upon which it will permit the collector to be sued. One of those conditions is that the appraisal shall be regarded as final; and it has been held by this court, in *Arnson* v. *Murphy* (109 U. S., 238), that the right to bring such a suit is exclusively statutory, and is substituted for any and every common-law right. The action is, to all intents and purposes—with the provisions for refunding the money if the importer is successful in the suit—an action against the Government for moneys in the Treasury. The provision as to the finality of the appraisement is virtually a rule of evidence to to be observed in the trial of the suit brought against the collector.
>
> The uniform course of legislation and practice, in regard both to the mode of selection of the merchant appraiser and as to the conclusive effect of the appraisal, are entitled to great weight. (*Stuart* v. *Laird*, 1 Cranch, 299, 309; *Martin* v. *Hunter's Lessee*, 1 Wheat., 304, 352; *Cohens* v. *Virginia*, 6 Wheat., 264, 418, 421; *Cooley* v. *Board of War-*

dens, 12 How., 299, 315; *Lithographic Co.* v. *Sarony*, 111 U. S., 53, 57; *The Laura*, 114 U. S., 411, 416.)

The decision is reaffirmed in *Passavant* v. *United States* (148 U. S., 214, 219). That case arose under the act of 1890, but, in the words of plaintiff's present counsel in his brief in that case (p. 12), "the act of 1890 is no more peremptory as to the finality of an appraisement than were corresponding provisions of prior statutes."

IV.

The valuation of the reappraisers being unimpeachable, it follows that the collector was right in exacting the 20 per cent additional duty.

It is not denied that the statute is absolutely explicit upon this point. The fixing of the additional percentage is a mere matter of computation.

> If such appraised value shall exceed by 10 per centum or more the value so declared in the entry, then, in addition to the duties imposed by law on the same, there shall be collected a duty of 20 per centum ad valorem on such appraised value. (Rev. Stat., § 2900.)

The "appraised value" here referred to is the value fixed by the original appraiser, or, in case of an appeal, by the reappraisers.

The penalty must, therefore, be levied if the statute is constitutional. That was the question before the court in *Passavant* v. *United States* (148 U. S., 214), and the statute was held to be valid. The Passavant case, indeed,

arose under the Customs Administrative Act of June 10, 1890, instead of under the Revised Statutes, but the relevant provisions are substantially the same.

The plaintiff in error in the Passavant case was represented by the same learned counsel who signs the brief now filed in the case at bar; and that this case is indistinguishable from its predecessor in principle is inferable from a comparison of the plaintiffs' briefs in the two cases. For instance, the whole of his present Point IV, beginning with his quotation from Chief Justice Taney, is clipped bodily from his Passavant brief, with slight change in the order of the paragraphs.

The court held the penalty clause constitutional, Mr. Justice Jackson saying:

> The appraised value of the merchandise having been conclusively ascertained in the manner provided by law, and being found to exceed by more than 10 per cent, the value declared in the entry, the collector, as a matter of mere computation, under the direction and authority of section 7 of said act, properly levied and collected, in addition to the ad valorem duty imposed by law on such merchandise, a further sum, etc. * * * As stated by Mr. Justice Campbell, speaking for the court, in *Bartlett* v. *Kane* (16 How., 263, 274), such additional duties "are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud." They are designed to discourage undervaluation upon imported merchandise and to prevent efforts to escape the legal rates of duty. It is wholly immaterial whether they are called additional duties or penalties. Congress has the power to impose them under either designation or character. When the

dutiable value of the merchandise is finally ascertained to be in excess of the value declared in the entry by more than 10 per cent this extra duty or penalty attaches, and the collector is directed and required to levy and collect the same in addition to the ad valorem duty provided by law. The importers in this case can not be heard to complain of this additional duty or penalty, which was a legal incident to the finding of a dutiable value in excess of the entry value to the extent provided by the statute. They had full notice of the proceedings before the board of general appraisers upon their appeal to said board, and ample opportunity to be heard on the question of the market value of the imported goods. It can not, therefore, be properly said that they have been subjected to penalties without notice or an opportunity to be heard, or been deprived of their property without due process of law.

The Passavant case but formally affirmed the validity of a provision that had stood unchallenged since 1818, and to which the doctrine of practical recognition could well have been applied (III, *supra*).

It is not intended here to argue that the "additional duty" is not a penalty. It was decided by Attorney-General Legaré in 1843 (4 Op., 182) that within the meaning of other statutes it was to be classed among penalties, fines, and forfeitures; and on a full review of past statutes and decisions, this opinion was followed by the present Attorney-General on September 9, 1893, saying: "It is no less a penalty because proof of fraud or other willful misconduct is not a necessary preliminary to its infliction. It is in its essence a fine inflicted to promote honesty." It is an incentive to liberal valuation

by the importer. It is a condition to which he is obliged to submit, just as he has to submit to the appraiser's valuations (*Auffmordt* v. *Hedden*, at p. 329), and just as foreign insurance companies in the various States have to submit to annoying regulations as a condition to doing business there.

It has been enforced by the courts in a long line of cases, among which may be mentioned, besides those cited in the Passavant opinion, *Greely* v. *Thompson* (10 How., 225); *Maxwell* v. *Griswold* (*id.*, 242); *Ring* v. *Maxwell* (17 How., 147); *Stairs* v. *Peaslee* (18 How., 521); *Belcher* v. *Lawrason* (21 How., 251); *Tappan* v. *United States* (2 Mason, 393, 402); *Swanston* v. *Morton* (1 Curt., 294); *Kriesler* v. *Morton* (2 Curt., 239).

V.

The other exceptions are also untenable.

(1) *As to the goods not reappraised.*—Plaintiff's manager testified that he saw the *assistant* appraiser about these goods. The manager was then asked whether or not he said anything to the assistant appraiser, and if so, what, as to the production of evidence as to the value of these goods. The question was excluded and exception taken. The manager then testified that he had a conversation with the collector as to a reappraisal or a call for a reappraisal. He was asked what that conversation was. This question was also excluded and exception taken. No offer of proof was made, and there is no explanation in the record as to what evidence plaintiff intended to call forth. The objections by the district attorney were

put on the ground that the importer's remedy for any defect or informality on the appraisement was by calling for a reappraisement, and on the ground of defect in the protest. It does not appear why the questions were excluded. The exclusion is to be sustained if there were any good ground of objection to the question. (*Silsby* v. *Foote*, 14 How., 218.)

It is not claimed in the protest that any reappraisal was called for and refused. But assuming that the protest was sufficient in this respect, and assuming, moreover, that the importer had no remedy in the matter further than calling for a reappraisement, nevertheless the questions were properly excluded as incompetent. Plaintiff's agent certainly could not testify as to what he said to an assistant appraiser, even if the assistant appraiser were a person competent to make admissions to bind the Government, which does not appear. Nor does it appear that the conversation with the collector (assuming that conversation to be otherwise competent) referred to any irregularity in the appraisement.

But it is respectfully submitted that the district attorney's objection was well founded; that the remedy of the importer on the question of valuation was by calling for a reappraisement. The appraiser in the custom-house is a mere administrative officer, with no judicial or quasi-judicial character or duties. He is not required to be a qualified expert, although he is provided with skilled assistants at the port of New York. It is entirely proper for him to act under instructions through special agents of the Treasury or any other superior officials. The

whole matter is statutory; and, as the statute gives a remedy by way of reappraisement as to all questions of valuation, it is respectfully submitted that this remedy is exclusive, just as the statutory remedy is always exclusive when the right as well as the remedy is a creature of statute. (Endlich on Interpretation of Statutes, §§ 465 *et seq.* and cases cited; *Barnet* v. *National Bank*, 98 U. S., 555, 558.)

It is true that in some cases so-called acts of the appraiser may be reviewed without calling for a reappraisement. This, however, is not the case upon the issue of valuation. The authorities upon which plaintiff relies, such as *Oberteuffer* v. *Robertson* (116 U. S., 499), *Badger* v. *Cusimano* (130 U. S., 39), and *Robertson* v. *Frank* (132 U. S., 17), relate to other issues as to which the reappraisers have no jurisdiction. In the case first cited, Mr. Justice Blatchford, speaking for the court, at pages 515, 516, makes the following remarks:

> It is contended for the Government that a reappraisement should have been applied for by the plaintiffs under section 2930 of the Revised Statutes, and that they mistook their remedy. * * * They were not dissatisfied with the appraisement of the value of the goods *per se*. That value was left at the value stated in the invoice. The addition of the items for cartons and packing was no part of the duty or function of the appraiser, acting under section 2906, to appraise the foreign market value of the goods. Although, in form, the appraiser added the items for cartons and packing, the action of the custom-house was only a decision of the collector, under section 2931, that the cartons and packing were dutiable costs and charges.

(2) The question whether the goods in the two last importations were all of the same character as to value (p. 15) we have already discussed.

It certainly can not be material whether any particular Treasury agent heard any of the questions put by the reappraisers to any particular witness, or whether he put any questions himself to the witness (pp. 15, 16). Anybody had the right to appear as *amicus curiæ* by leave of the reappraisers.

Plaintiff made the point in summing up that section 2900 of the Revised Statutes was unconstitutional so far as concerned the provision for the "additional duty." The court expressed the opinion that this point was not open under the plaintiff's protest. The authorities upon this point we have already cited. The question, moreover, is disposed of on its merits by *Passavant* v. *United States*, *supra*.

It is respectfully submitted that the judgment should be affirmed.

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